No. 50098-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON
Respondent,

v.

JOSEPH JAMES CHESLEY,
Appellant.

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# OPENING BRIEF OF APPELLANT

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Appeal from the Superior Court of Pierce County,
Cause No. 16-1-01097-2
The Honorable Stephanie Arend, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. RCW 43.43.7541, RCW 7.68.035 and RCW 36.18.020(2)(h) violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

2. The trial court erred in imposing Legal Financial Obligations (LFOs) by failing to comply with RCW 10.01.130(3).

3. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do RCW 43.43.7541, RCW 7.68.035 and RCW 36.18.020(2)(h) violate substantive due process where the statutes mandate trial courts impose LFOs even when the defendant does not have the present ability or the likely future ability to pay the fees? (Assignments of Error Nos. 1 & 2)

2. Should this Court remand with instructions to strike the LFOs and undertake a proper inquiry where the trial court imposed LFOs without any consideration of Mr. Chesley's ability to pay? (Assignments of Error Nos. 1 & 2)

3. If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Chesley is indigent, as noted in the Order of Indigency? (Assignment of Error No. 3)

C. STATEMENT OF THE CASE

**Factual and Procedural Background**

On February 9, 2017, Mr. Joseph Chesley pleaded guilty to failure

to remain at an injury accident, attempting to elude a pursuing police vehicle, unlawful possession of a stolen vehicle, unlawful possession of a hydrocodone, unlawful possession of cocaine, and unlawful possession of methamphetamine.[1]

The trial court imposed the lowest standard range sentence possible on all crimes with all sentences to run concurrently.[2] The trial court found Mr. Chesley to be indigent but still imposed $500 in crime victim assessment, a $100 DNA database fee, and a $200 criminal filing fee.[3] The trial court engaged in no inquiry into Mr. Chesley's future ability to pay any legal financial obligations.[4]

Notice of appeal was filed on March 6, 2017.[5]

## D. ARGUMENT

### 1. RCW 43.43.7541, 7.68.035 and 36.18.020(2)(h) are unconstitutional as applied to defendants who do not have the present ability, or likely future ability, to pay LFOs.

#### *i. Standard of Review.*

"Constitutional questions are questions of law and, accordingly, are subject to de novo review. Statutes are presumed constitutional, and

[1] RP 12-13.
[2] RP 15-16; CP 44-58.
[3] CP 44-58.
[4] RP 13-16.
[5] CP 59-61.

the burden is on the challenger to prove otherwise."[6]

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law.[7] The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.[8]

Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.[9] It requires that deprivations of life, liberty, or property be substantively reasonable; in other words, such deprivations are constitutionally infirm if not supported by some legitimate justification.[10]

The level of review applied to a substantive due process challenge depends on the nature of the right affected.[11] Where a fundamental right is not at issue, as is the case here, the rational basis standard applies.[12]

To survive rational basis scrutiny, the State must show its

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[6] *State v. McCuistion*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012), *cert. denied* 133 S.Ct. 1460 (2013) (internal citations omitted).
[7] U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3.
[8] *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).
[9] *Id*. at 218 19.
[10] *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221, 1225 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625 26 (1992)).
[11] *Johnson v. Washington Dep't of Fish & Wildlife*, 175 Wn. App. 765, 775, 305 P.3d 1130, *review denied* 179 Wash.2d 1006 (2013).
[12] *Nielsen*, 177 Wn. App. at 53-54.

regulation is rationally related to a legitimate state interest.[13] Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test is not a toothless one.[14] As the Washington Supreme Court has explained, the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.[15] Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause.[16]

*ii. RCW 43.43.7541, 7.68.035 and 36.18.020(2)(h) fail the rational basis test where they permit the State to impose "mandatory" LFOs on individuals who lack a present or future ability to pay those LFOs.*

As stated above, to survive rational basis scrutiny, the State must show that its regulation is rationally related to a legitimate state interest.[17]

RCW 9.94A.760 permits the trial court to impose costs authorized by law when sentencing an offender for a felony. It is not disputed that the challenged statutes arguably serve a legitimate state interest.

RCW 43.43.7541 authorizes the collection of a $100 DNA-

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[13] *Id*.
[14] *Mathews v. DeCastro*, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976).
[15] *DeYounq v. Providence Med. Ctr.*, 136 Wn. 2d 136, 144, 960 P.2d 919 (1998) (determining the statute at issue did not survive rational basis scrutiny); *Nielsen*, 177 Wn. App. at 61 (same).
[16] *Id*.
[17] *Id*.

collection fee. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender s DNA profile in order to help facilitate future criminal identifications.[18] This is a legitimate interest.

RCW 7.68.035 provides that a $500 crime victim penalty shall be imposed upon anyone who has been found guilty in a Washington Superior Court. This ostensibly serves the State's interest in funding comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes.[19]

RCW 36.18.020(2)(h) directs that following a conviction or guilty plea a defendant shall be liable for a $200 filing fee. RCW 36.18.020(2)(h) ostensibly serves the State's interest in compensating court clerks for their official services.[20]

However, these statutes violate substantive due process when applied to defendants who do not have the present ability or will not likely have the future ability to pay the fine. Imposing these fees on defendants who are unable to pay does not further the State's interest in funding DNA collection, victim-focused programs or clerk's fees. As the Washington Supreme Court recently emphasized, the state cannot collect money from

[18] RCW 43.43.752- 7541.
[19] RCW 7.68.035(4).
[20] RCW 36.18.020(2).

defendants who cannot pay.[21] There is no legitimate economic incentive served in imposing these LFOs.

Likewise, the State's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he does not have the ability to do so. In order to foster accountability, a sentencing condition must be something that is achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable.

The Supreme Court also recognized that the State's interest in deterring crime via enforced LFOs is actually undermined when LFOs are imposed on people who do not have the ability to pay.[22] This is because imposing LFOs upon a person who does not have the ability to pay actually increase[s] the chances of recidivism.[23]

Likewise, the State's interest in uniform sentencing is not served by imposing mandatory LFOs on those who do not have the ability to pay. This is because defendants who cannot pay are subject to an undeterminable length of involvement with the criminal justice system and often end up paying considerably more than the original LFOs imposed (due to interest and collection fees), and in turn, considerably more than

[21] *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015).
[22] *Id*.
[23] *Id*. at 836-37 (citing relevant studies and reports).

their wealthier counterparts.[24]

When applied to indigent defendants, not only do the "mandatory" fees fail to further the State's interests, they are pointless. It is irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay at the time of sentencing and who likely will not have the ability to pay in the future.

There is no legitimate state interest in requiring sentencing courts to impose a mandatory fees without the State first establishing the defendant's ability to pay. This Court should find the trial court erred in imposing these fees without first determining Mr. Chesley's ability to pay and also find that the statutes violate due process.

*iii. Given Washington's statutory scheme for LFO enforcement, imposing "mandatory" LFOs on defendants where the court has not affirmed the defendant's present or future ability to pay those LFOs is actually contrary to legitimate State interests.*

The imposition of one or more of these this "mandatory" fees upon defendants who cannot pay the fee does not rationally serve the interest ostensibly furthered by the statutes. First, it is highly unlikely that any money will be paid to the State to further those interests. Second, imposing LFOs that a defendant will never be able to pay and will

[24] *Id*. at 836-37.

ultimately drive that defendant into a downward spiral of inescapable debt actually works contrary to any legitimate State interests.

Currently, Washington's laws set forth an elaborate and aggressive collections process which includes the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families.[25]

First, under RCW 10.82.090(1), LFOs accrue interest at a compounding rate of 12 percent--an astounding level given the historically low interests rates of the last several years.[26] Interest on LFOs accrues from the date of judgment.[27] This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades.[28] Yet, there is no requirement for the court to have conducted an inquiry into ability to pay before

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[25] See, Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay).
[26] *Blazina*, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013).
[27] RCW 10.82.090.
[28] See, Harris, supra at 1776-77 (explaining those who make regular payments of $50 a month toward a typical legal debt will remain in arrears 30 years later).

interest is assessed.

Washington law also permits courts to order a payroll deduction.[29] This can be done immediately upon sentencing.[30] Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee's earnings.[31] This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs.[32] As for garnishment, this enforced collection may begin immediately after the judgment is entered.[33] Wage assignment is a collection mechanism that may be used within 30 days of a defendant s failure to pay the monthly sum ordered.[34] And, employers are permitted to charge a processing fee.[35]

Washington law also permits courts to use collections agencies or county collection services to actively collect LFOs.[36] The defendant pays

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[29] RCW 9.94A.760(3).
[30] RCW 9.94A.760(3).
[31] RCW 9.94A.7604(4).
[32] RCW 6.17.020; RCW 9.94A.7701; see also, *Harris, supra*, at 1778 (providing examples of wage garnishment as an enforcement mechanism).
[33] RCW 6.17.020.
[34] RCW 9.94A.7701.
[35] RCW 9.94A.7705.
[36] RCW 36.18.190.

any penalties or additional fees these agencies decide to assess.[37] There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement.[38]

These examples show that under Washington's currently broken LFO system, there are many instances where the Legislature provides for enforced collection and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgment and sentence is entered.

In sum, Washington s LFO system is broken in part because the courts have not followed through with the constitutional requirement that LFOs only be imposed upon those that have the ability or likely ability to pay. It is not rational to impose a fee upon a person who does not have the ability to pay. The *Blazina* court noted that Washington's LFO system led to "increased difficulty in reentering society," "doubtful recoupment" of the money by the government, and "inequities in administration."[39] It also cited an academic article detailing the "problematic consequences" of Washington's LFO system, including high interest rates and collection

[37] *Id*.
[38] *Id.*
[39] *Blazina*, 182 Wn.2d at 835.

fees that leave many defendants owing "more 10 years after conviction than they did when the LFOs were initially assessed."[40] The article notes, "Along with incarceration and supervision, the fines, fees, and restitution imposed in a sentence are some of the most significant and far reaching consequences of a conviction."[41]

In the end, the *Blazina* court held that "the sentencing judge must make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."[42] And "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs."[43]

*Blazina* explicitly applies only to discretionary LFOs. But its reasoning applies equally to all LFOs, including mandatory LFOs. And this makes sense. The hazards of LFOs—barriers to reentry, doubtful recoupment, inequities in administration, and snowballing interest and collection fees—follow as equally from mandatory LFOs as from discretionary LFOs. Money is money, whether it is a fee imposed at the court's discretion or a fee imposed at the legislature's direction. And if a defendant is unable to pay, then he or she is unable to pay.

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[40] *Blazina*, 182 Wn.2d at 836 (citing, Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013) available at http://digitalcommons.law.seattleu.edu/sjsj/vol11/iss3/6).
[41] Stearns, at 965.
[42] *Blazina*, 182 Wn.2d at 839.
[43] *Blazina*, 182 Wn.2d at 839.

This likely means that respondents end up committing offenses that they can never pay for, at least not monetarily. And although this is unfortunate, it is utterly unavoidable. Sometimes poor people commit crimes, and the fact of committing a crime does not leave them with money. The fact of breaking a window, for example, does not mean they can then pay for a new window.

RCW 43.43.7541, 7.68.035 and 36.18.020(2)(h) might ostensibly serve a legitimate state interest, but those statutes fail the rational basis test where they permit the State to impose mandatory LFOs on individuals who do not have a demonstrable present or future ability to pay. Not only will the offenders never pay any money towards the programs the LFOs are intended to support, but imposing LFOs on offenders who cannot pay them leads to negative consequences on employment, on housing, and on finances, all of which lead to increased recidivism.[44] Increased recidivism in not a legitimate State interest.

Hence, when imposed on defendants such as Mr. Chesley who do not have the ability to pay any discretionary LFOs, the "mandatory" DNA-collection fee and crime victim fee and filing fee do not reasonably relate to the State interests served by those statutes. Consequently, this Court should find RCW 43.43.7541, RCW 7.68.035 and RCW 36.18.020(2)(h)

[44] *Blazina,* 182 Wn.2d at 837.

violate substantive due process and vacate the LFO order.

**2. The LFO order should be stricken because the trial court failed to comply with RCW 10.01.160(3).**

RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the current or future ability to pay.[45]

Here, the trial court imposed legal financial obligations with no analysis of Mr. Chesley's ability to pay. As such, the trial court did not comply with RCW 10.01.160(3) and the LFO order should be stricken.

The Supreme Court recently emphasized: a trial court has a statutory obligation to make an individualized inquiry into a defendant s current and future ability to pay before the court imposes LFOs.[46] There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.[47] LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe

[45] RCW 10.01.160(3) provides: "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."
[46] *Blazina*, 182 Wn.2d at 827.
[47] *Id*. at 835.

the state more money 10 years after conviction than when the LFOs were originally imposed.[48] In turn, this causes background checks to reveal an active record, producing serious negative consequences on employment, on housing, and on finances.[49] All of these problems lead to increased recidivism.[50] A failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending.[51]

The State may argue that the court properly imposed these costs without regard to Mr. Chesley's ability to pay because these are so-called mandatory LFOs and the authorizing statutes use the word shall or must.[52] However, these statutes must be read in tandem with RCW 10.01.160(3), which, as explained above, requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.[53]

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[48] *Id*. at 836.
[49] *Id*. at 837.
[50] *Id*.
[51] *See* RCW 9. 94A.010.
[52] RCW 7.68.035; RCW 43.43.7541; *State v. Lundy*, 176 Wn. App. 96, 102- 03, 308 P.3d 755 (2013).
[53] *See, State v. Jones*, 172 Wn.2d 236, 243, 257 P.3d 616 (2011) (statutes must be read together to achieve a harmonious total statutory scheme).

When the legislature means to depart from a presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution shall be ordered for injury or damage absent extraordinary circumstances, but also states that the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.[54] This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts.[55] Although the legislature amended the DNA statute to remove consideration of hardship at the time the fee is imposed (compare RCW 43.43.7541 (2002) with RCW 43.43.7541 (2008)), it did not add a clause precluding waiver of the fee for those who cannot pay it. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

In response, the State may argue that this issue has been waived and should not be considered for the first time on appeal. Even though defense counsel did not object to the imposition of these LFOs below, this Court has the discretion to reach this error consistent with RAP 2.5.[56] As shown below, given the trial court's failure to conduct any semblance of

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[54] RCW 9.94A.753.
[55] *See, State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093, 1097 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).
[56] *Blazina*, 344 P.3d at 681.

an inquiry into Sward's ability to pay and given his indigent status, this Court should exercise its discretion under RAP 2.5(a) and consider the issue.

First, *Blazina* provides compelling policy reasons why trial courts must undertake a meaningful inquiry into an indigent defendant s ability to pay at the time of sentencing and why, if that is not done, the problem should be addressed on direct appeal. The Supreme Court discussed in detail how erroneously imposed LFOs haunt those who cannot pay, not only impacting their ability to successfully exit the criminal justice system but also limiting their employment, housing and financial prospects for many years beyond their original sentence.[57] Considering these circumstances, the Supreme Court concluded that indigent defendants who are saddled with wrongly imposed LFOs have many reentry difficulties that ultimately work against the State's interest in reducing recidivism.[58]

As a matter of public policy, courts must do more to make sure improperly imposed LFOs are quickly corrected. As *Blazina* shows, the remission process is not an effective vehicle to alleviate the harsh realities recognized in that decision. Instead, correction upon remand is a far more reasonable approach from a public policy standpoint.

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[57] *Blazina*, 344 P.3d at 683-85.
[58] *Id*.

Second, there is a practical reason why appellate courts should exercise discretion and consider, on direct appeal, whether the trial court complied with RCW 10.01.160(3). As the Supreme Court recognized in *Blazina*, the state cannot collect money from defendants who cannot pay.[59] There is nothing reasonable about requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal. Remanding back to the same sentencing judge to make the ability-to-pay inquiry is more efficient, saving the defendant and the State from a wasted layer of administrative and judicial process.

The State may also argue that Mr. Chesley agreed to the imposition of the LFOs in his guilty plea statement. Paragraph (m) of the guilty plea statement reads, "I will be required to pay a $100.00 DNA collection fee."[60] Any argument that by this paragraph Mr. Chesley agreed to the imposition of LFOs would miss the mark. That part of the statement references the LFO statutes at issue. It is not an express waiver of the right to have the court determine his ability-to-pay those costs.

In sum, RCW 10.01.160(3) requires that the trial court conduct an ability-to-pay inquiry for all LFOs. While other statutes purport to impose mandatory fees, these must be harmonized with RCW 10.01.160(3). As

[59] *Id*. at 684.
[60] CP 33, paragraph (m).

such, unless the statute specifically says that an LFO must be paid regardless of a defendant s financial situation, there must be an ability-to-pay inquiry. Consequently, this Court should exercise its discretion, consider the issue, and remand with instructions that the sentencing court conduct a meaningful, on-the-record inquiry into Seward's ability to pay LFOs.

### 3. If the state substantially prevails, the Court of Appeals should decline to award any appellate costs requested.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail.[61]

Appellate costs are "indisputably" discretionary in nature.[62] The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. Furthermore, "[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals'] obligation to exercise

[61] *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied,* 185 Wn.2d 1034 (2016).
[62] *Id.,* at 388.

discretion when properly requested to do so."[63]

Mr. Chesley has been convicted of a felony and sentenced to prison. The trial court determined that she is indigent for purposes of this appeal.[64] There is no reason to believe that status will change. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations.[65]

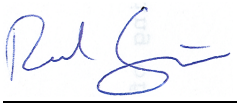
If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

E. CONCLUSION

For reasons stated above, this Court should vacate the trial court's order that Seward pay LFOs. Alternatively, this Court should strike the court ordered LFOs and remand for a hearing on Mr. Chesley's ability to pay.

DATED this 7th day of August, 2017.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

[63] *Sinclair*, 192 Wn. App. at 388.
[64] CP 192-193.
[65] *Blazina*, 182 Wn.2d at 839, 344 P.3d 680.

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 28th day of July, 2017, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Pierce County Prosecuting Attorney's Office
930 Tacoma Ave. South, Room 946
Tacoma, WA 98402

And to:

Mr. Joseph Chesley, DOC# 863096
15314 NE Dole Valley Road
Yacolt, WA 98675-9531

Signed at Tacoma, Washington this 28th day of July, 2017.

Reed Speir, WSBA No. 36270

## LAW OFFICE OF REED SPEIR

## August 07, 2017 - 2:26 PM

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